No. 10149

In the United States Circuit Court of Appeals for the Ninth Circuit

STANLEY LABORATORIES, INC., AND EDWARD A. BACHMAN, AN INDIVIDUAL TRADING AS STANLEY LABORATORIES AND AS STILLMAN PRODUCTS COMPANY, PETITIONERS

v.

FEDERAL TRADE COMMISSION, RESPONDENT

ON PETITION TO REVIEW AN ORDER OF THE FEDERAL TRADE COMMISSION

BRIEF FOR RESPONDENT

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I

STATEMENT OF THE CASE

1. The Pleadings

This is an administrative law proceeding arising upon a petition to review and set aside an order to cease and desist issued by the Federal Trade Commission, respondent, pursuant to a complaint charging petitioners with engaging in unfair and deceptive acts and practices in commerce in violation of the Federal Trade Commission Act.[1]

[1] Pertinent provisions of the statute are set forth *infra* pp. 32–34.

The complaint (R. 1–11) issued May 7, 1940, alleged that petitioner Edward A. Bachman is president of, controls and directs the business activities, sales policies and practices of, and has his principal office and place of business at the same address as, petitioner Stanley Laboratories, Inc., an Oregon corporation having its principal place of business in Portland, Oregon; that petitioner Stanley Laboratories, Inc., and petitioner Edward A. Bachman, individually and while trading as Stillman Products Company and as Stanley Laboratories, were engaged in the sale and distribution in interstate commerce of a certain drug product for feminine hygiene designated "M. D. Medicated Douche Powder," in connection with which they disseminated false advertisements by means of the United States mails and in interstate commerce by various means (R. 2).[2] Typical examples of the representations made by petitioners were set out in the complaint (R. 3–5), and it was charged that by their use petitioners falsely represented that:

> M. D. Medicated Douche Powder is a recent development of scientific research which is endorsed by leading physicians and surgeons; that said preparation is a competent and effective contraceptive; that said preparation is an antiseptic and germicide which will combat any

[2] Petitioners were also charged with disseminating false advertisements with respect to other products. No order was entered in that connection, however, and those allegations of the complaint are not here involved, the Commission having found that "there is not sufficient evidence in the record as to the dissemination of any particular advertisement * * * to warrant any finding involving" the products in question (R. 28).

form of bacteria; that such preparation has competent remedial qualities for use on cuts, sores, and burns, and that said preparation will relieve fatigue and annoying discharge connected with the menstrual period. [R. 5–6.]

The complaint further charged that by means of the use of the letters "M. D." to designate the product "M. D. Medicated Douche Powder," together with the likenesses of nurses and doctors and the figure of a cross in simulation of the Red Cross emblem, petitioners falsely represented that their product is either prescribed or compounded by physicians or bears the endorsement or recommendation of the medical profession (R. 7).

By their answer (R. 11–15), filed June 15, 1940, petitioners admitted all of the material allegations of the complaint except the allegation to the effect that their use of the letters "M. D.," together with the likenesses of nurses and doctors and the figure of a cross in simulation of the Red Cross emblem, was misleading and deceptive.

At the initial hearing all the allegations of Paragraphs 1, 2, 3, 4, 7 and 8 of the complaint were stipulated to be true (R. 34–40), and without objection on the part of petitioners there was received in evidence (R. 46) a letter addressed to the Commission under date of June 21, 1940, in which petitioners, by their attorney, admitted all the allegations of Paragraphs 1, 2, 3, 4 and 7, and also the allegations of Paragraph 5 (Comm. Ex. 20, R. 47). Thus, by answer, stipulation and letter, petitioners three times admitted the allegations of Paragraphs 1, 2, 3, 4 and 7 of the

complaint and twice admitted the allegations of Paragraphs 5 and 8.

2. Findings as to the Facts and Order to Cease and Desist

After the taking of evidence on behalf of both the Commission and petitioners, the Commission, on April 1, 1942, made its findings as to the facts (R. 21–29), which accord with the allegations of the complaint. The Commission also found that the "use of a cross simulating the American Red Cross emblem in design, either alone or in combination with the letters 'M. D.' or with the picture of a nurse or doctor, has a tendency and capacity to cause members of the purchasing public to believe that the product is in some way endorsed or approved by the American Red Cross" (R. 28). Accordingly, the Commission concluded that petitioners' practices were in violation of the Federal Trade Commission Act and it entered an appropriate order to cease and desist. The only provisions questioned by petitioners (brief, p. 21) are those directing them to discontinue:

> 4. The use of the letters "M. D." in [petitioners'] trade name, or in any other manner, either alone or in conjunction with the picturization of a doctor, nurse, or cross, to designate or describe [petitioners'] preparation, or any other preparation which has not been endorsed or recommended by the medical profession;
>
> 5. The use of the picturization of a cross or any other simulation of the American Red Cross emblem, either alone or in conjunction with the picturization of a doctor or a nurse, to desig-

nate or describe [petitioners'] preparation. R. [32–33.]

Petitioners thereafter filed their petition to review and set aside the Commission's order, to modify it in whole or in part, or to reopen the proceeding for the purpose of taking additional testimony (R. 340–347).

II

QUESTION PRESENTED

In their statement of points, petitioners set forth eight points upon which they intend to rely (R. 348–349), and in their brief make nine assignments of alleged error (pp. 7–9). In developing their argument, however, petitioners concede that Paragraphs 1, 2, 3, 6, and 8 and the first half of Paragraph 4 of the Commission's findings as to the facts are supported by substantial evidence (brief, pp. 10–11), and they confine their challenge to Paragraphs 5, 7 and 9 and the last half of Paragraph 4. After arguing at some length that these paragraphs of the findings are not supported by evidence, petitioners then state that they "have no objection to Pars. 1, 2, 3 and 6" of the Commission's order to cease and desist (brief, p. 21), and they conclude their brief with a prayer that the Commission's order be set aside only "to the extent that petitioners may continue to use the letters 'MD' in the sale of MD Medicated Douché Powder, and the cross and nurse" (brief, p. 27). The prohibitions thus referred to are those contained in Paragraphs 4 and 5 of the Commission's order (R. 32–33), and are based on the Commission's findings set forth in Paragraphs

7 and 9 of its findings as to the facts (R. 27–29), to the effect that petitioners' use of the letters "M. D.," the likenesses of nurses and doctors and the figure of a cross in simulation of the American Red Cross emblem are deceptive in that they tend to lead the public to believe that petitioners' preparation is endorsed by the medical profession and endorsed or approved by the American Red Cross.

In the circumstances, the only question presented, and therefore the only question which need be argued, is whether Paragraphs 7 and 9 of the Commission's findings as to the facts are supported by substantial evidence, and petitioners' argument with respect to the remainder of the Commission's findings, dealing principally with the lack of therapeutic value in their preparation, is entirely beside the point. We may say in passing, however, that not only were those findings supported by the testimony of five medical doctors whose qualifications as experts were not questioned by petitioners, but also by petitioners own judicial admissions (*supra,* pp. 3–4), and it is fundamental that "judicial admissions are proof possessing the highest possible probative value. Indeed, facts judicially admitted are facts established not only beyond the need of evidence to prove them, but beyond the power of evidence to controvert them." *Hill* v. *Federal Trade Commission,* 124 F. 2d 104, 106 (C. C. A. 5th, 1941).

We might also notice here petitioners' Point II (brief, pp. 23–25) to the effect that a certain so-called "stipulation" which they say they filed with the Commission makes the Commission's order "improper and

unnecessary." Petitioners have filed no stipulation with the Commission. The document to which they refer (Comm. Ex. 17 A–C, not printed) is a letter to the Commission, written prior to the issuance of the complaint, in which petitioners *rejected* a stipulation to cease and desist submitted to them by the Commission,[3] and offered to enter into a different stipulation which the Commission did not accept. The point which petitioners seek to make in this connection is not entirely clear, but seems to be that since they stated in their letter that they had discontinued most of the practices against which the Commission's order is directed, the order is invalid. There are two answers to this. Discontinuance of an unlawful prac-

[3] The execution of stipulations to cease and desist is a procedure devised by the Commission as a means of informally securing voluntary compliance with the Federal Trade Commission Act in certain types of cases in which proposed respondents are willing voluntarily to discontinue unlawful practices, thus terminating, without the necessity of formal proceedings, and with a minimum of public and private expense, many violations of law. The Commission's Statement of Policy in this connection reads in part as follows: "Whenever the Commission shall have reason to believe that any person has been or is using unfair methods of competition or unfair or deceptive acts or practices in commerce, and that the interest of the public will be served by so doing, it may withhold service of complaint and extend to the person opportunity to execute a stipulation satisfactory to the Commission, in which the person, after admitting the material facts, promises and agrees to cease and desist from and not to resume such unfair methods of competition or unfair or deceptive acts or practices. All such stipulations shall be matters of public record, and shall be admissible as evidence of prior use of the unfair methods of competition or unfair or deceptive acts or practices involved in any subsequent proceeding against such person before the Commission." Federal Trade Commission, Rules, Policy & Acts (January 11, 1943) 26–27.

tice is no defense in Federal Trade Commission proceedings;[4] but even if it were, it would not be available to petitioners because they have not discontinued the practices to which the only contested provisions of the Commission's order relate; on the contrary, petitioners are insisting that the practices are lawful and that they have the right to continue them.

A third contention may be mentioned, petitioners' Point III (brief, pp. 25–27), to the effect that the Commission erred in denying petitioners' motion to strike certain testimony of several witnesses (R. 315–328, 18–20). The contention is frivolous. Petitioners' motion was granted as to the witness Stipe (R. 20)—although petitioners neglect to inform the Court of the fact in their brief—and no part of the testimony stricken was designated for inclusion in the printed record.[5] The questioned testimony of the witness Bachman (R. 155–163), while plainly admissible, and

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[4] *Federal Trade Commission* v. *Goodyear Tire & Rubber Co.*, 304 U. S. 257, 260 (1938); *Philip R. Park, Inc.* v. *Federal Trade Commission*, — F. 2d — (C. C. A. 9th, 1943); *Juvenile Shoe Co.* v. *Federal Trade Commission*, 289 F. 57, 59–60 (C. C. A. 9th, 1923), cert. denied 263 U. S. 705 (1923); *Hershey Chocolate Corp.* v. *Federal Trade Commission*, 121 F. 2d 968, 971 (C. C. A. 3rd, 1941); *Perma-Maid Co.* v. *Federal Trade Commission*, 121 F. 2d 282, 284 (C. C. A. 6th, 1941); *Educators Association* v. *Federal Trade Commission*, 108 F. 2d 470, 473 (C. C. A. 2nd, 1939); *Federal Trade Commission* v. *Wallace*, 75 F. 2d 733, 738 (C. C. A. 8th, 1935); *Federal Trade Commission* v. *Good-Grape Co.*, 45 F. 2d 70, 72 (C. C. A. 6th, 1930).

[5] Compare petitioners' motion at R. 316 with designation at R. 354 and testimony printed at R. 191–193. The page references in petitioners' motion related to the typewritten transcript of the testimony, of course, not to the printed record, but the transcript pagination is bracketed in bold face in the latter.

for the most part admitted without objection on the part of petitioners, has nothing to do with the single issue presented for review. All of the remaining testimony referred to in petitioners' motion, that of the Commission's expert witnesses, was also clearly admissible, most of it was admitted without objection on the part of petitioners, and every word of it pertinent to the sole issue here was either so admitted or consisted of testimony given on cross-examination by petitioners' own counsel.[6] In the circumstances, there is no basis whatever for petitioners' contention that the Commission erred in denying their motion,[7] and it may also be noted that even if there were, it is too

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[6] The pertinent testimony consisted of statements by the Commission's doctors as to how they believed the public would interpret petitioners' advertisements. It may be assumed, to borrow petitioners' language, that none of the doctors was "an expert on reading the minds of other people to determine whether they were deceived by the use of the letters 'MD'" (brief, p. 26). But the nature of their work and the character of their association with the public gave them special knowledge which peculiarly fitted them to express a helpful, and therefore competent, opinion upon the question of how petitioners' advertisements were likely to be read by those to whom they were addressed. See 7 Wigmore, Evidence (3rd ed. 1940) §§ 1923, 1976; 2 *id.* § 661; Rogers, Expert Testimony (3rd ed. 1941) 44–45, and *cf. Benton Announcements* v. *Federal Trade Commission*, 130 F. 2d 254 (C. C. A. 2nd, 1942) and *Loonen* v. *Deitsch*, 189 F. 487, 491 (S. D. N. Y. 1911).

[7] Testimony admitted without objection cannot be made the basis of complaint on appeal. *Lane* v. *Federal Trade Commission*, 130 F. 2d 48, 51 (C. C. A. 9th, 1942); *Reidy* v. *Myntti*, 116 F. 2d 725, 728 (C. C. A. 9th, 1940); *Collins* v. *Streitz*, 95 F. 2d 430, 436–437 (C. C. A. 9th, 1938), cert. denied 305 U. S. 608 (1938); *Opp Cotton Mills* v. *Administrator*, 312 U. S. 126, 155 (1941); *Kansas City Southern Ry.* v. *Albers Commission Co.*, 223 U. S. 573, 595–596 (1912).

well settled to require argument that error in the admission of evidence does not invalidate an administrative order to cease and desist.[8] Insofar as questions respecting the evidence are concerned, the courts' inquiry in administrative proceedings, such as this, is not whether evidence was properly or improperly admitted, but whether there is substantial evidence to support the administrative findings. If there is, the erroneous admission of evidence is immaterial. Since there was an abundance of substantial evidence to support the Commission's findings here, its admission of the evidence of which petitioners complain, even if erroneous, furnishes no ground for setting its order aside. *Hills Bros.* v. *Federal Trade Commission,* 9 F. 2d 481, 484 (C. C. A. 9th, 1926), cert. denied 270 U. S. 662 (1926); *Keller* v. *Federal Trade Commission,* 132 F. 2d 59, 61 (C. C. A. 7th, 1942); *Arkansas Wholesale Grocers' Assn.* v. *Federal Trade Commission,* 18 F. 2d 866, 871 (C. C. A. 8th, 1927), cert. denied 275 U. S. 533 (1927).

We restate the single issue presented, namely: Whether there is substantial evidence to support the Commission's findings that petitioners' use of the letters "M. D.," the likenesses of nurses and doctors and the figure of a cross in simulation of the American Red Cross emblem are deceptive in that they tend to lead the public to believe that petitioners' preparation is

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[8] *Opp Cotton Mills* v. *Administrator*, 312 U. S. 126, 155 (1941); *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, 229–230 (1938); *Tagg Brothers* v. *United States*, 280 U. S. 420, 442 (1930); *United States* v. *Abilene & Southern Ry.*, 265 U. S. 274, 288 (1924).

endorsed by the medical profession and endorsed or approved by the American Red Cross.

III

ARGUMENT

The applicable law is well settled.

The Commission's findings as to the facts, if supported by evidence, are conclusive. The statute so provides,[9] this Court has often so held,[10] and petitioners so concede (brief, p. 10). It is likewise settled that the "weight to be given to the facts and circumstances admitted, as well as the inferences reasonably to be drawn" therefrom are for the Commission, *Federal Trade Commission* v. *Pacific States Paper Trade Assn.*, 273 U. S. 52, 63 (1927), and the "possibility of drawing either of two inconsistent inferences from the evidence" does not prevent the Commission from drawing one of them. *National Labor Relations Board* v. *Nevada Consolidated Copper Corp.*, 316 U. S. 105, 106 (1942).

The rule applies notwithstanding the fact that the findings relate to matters upon which there is a con-

[9] Federal Trade Commission Act, § 5 (c); 52 Stat. 113; 15 U. S. C. A. § 45 (c); *Federal Trade Commission* v. *Standard Education Society*, 302 U. S. 112, 117 (1937); *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U. S. 67, 73 (1934); *Federal Trade Commission* v. *Pacific States Paper Trade Assn.*, 273 U. S. 52, 63 (1927).

[10] *Philip R. Park, Inc.* v. *Federal Trade Commission*, — F. 2d —(C. C. A. 9th, 1943); *American Medicinal Products, Inc.* v. *Federal Trade Commission*, — F. 2d — (C. C. A. 9th, 1943); *Lane* v. *Federal Trade Commission*, 130 F. 2d 48, 50 (C. C. A. 9th, 1942); *Alberty* v. *Federal Trade Commission*, 118 F. 2d 669, 670 (C. C. A. 9th, 1941), cert. denied 314 U. S. 630 (1941); *Electro Thermal Co.* v. *Federal Trade Commission*, 91 F. 2d 477, 479 (C. C. A. 9th, 1937), cert. denied 302 U. S. 748 (1937).

flict in the evidence,[11] as it is for the Commission to determine the credibility of the witnesses and the weight to be accorded to their testimony.[12] It applies also to the Commission's findings as to the meaning of advertisements, for the meaning of advertisements

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[11] *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U. S. 67, 73, 77 (1934); *John J. Fulton Co.* v. *Federal Trade Commission*, 130 F. 2d 85, 86 (C. C. A. 9th, 1942), cert. denied 317 U. S. 679 (1942); *Alberty* v. *Federal Trade Commission*, 118 F. 2d 669, 670 (C. C. A. 9th, 1941), cert. denied 314 U. S. 630 (1941); *Aronberg* v. *Federal Trade Commission*, 132 F. 2d 165, 170 (C. C. A. 7th, 1942); *Benton Announcements* v. *Federal Trade Commission*, 130 F. 2d 254 (C. C. A. 2nd 1942); *D. D. D. Corporation* v. *Federal Trade Commission*, 125 F. 2d 679, 680–682 (C. C. A. 7th, 1942); *Neff* v. *Federal Trade Commission*, 117 F. 2d 495, 497 (C. C. A. 4th, 1941); *Dr. W. B. Caldwell, Inc.* v. *Federal Trade Commission*, 111 F. 2d 889, 891 (C. C. A. 7th, 1940); *Justin Haynes & Co.* v. *Federal Trade Commission*, 105 F. 2d 988, 989 (C. C. A. 2nd, 1939), cert. denied 308 U. S. 616 (1939); *Fioret Sales Co.* v. *Federal Trade Commission*, 100 F. 2d 358, 359 (C. C. A. 2nd, 1938); *L. & C. Mayers Co.* v. *Federal Trade Commission*, 97 F. 2d 365 367 (C. C. A. 2nd, 1938); *E. Griffiths Hughes, Inc.* v. *Federal Trade Commission*, 77 F. 2d 886, 887 (C. C. A. 2nd, 1935), cert. denied 296 U. S. 617 (1935).

[12] *Aronberg* v. *Federal Trade Commission*, 132 F. 2d 165, 170 (C. C. A. 7th, 1942); *Keller* v. *Federal Trade Commission*, 132 F. 2d 59, 60–61 (C. C. A. 7th, 1942); *Dr. W. B. Caldwell, Inc.* v. *Federal Trade Commission*, 111 F. 2d 889, 891 (C. C. A. 7th 1940); *Wholesale Grocers' Assn.* v. *Federal Trade Commission*, 277 F. 657, 663 (C. C. A. 5th, 1922).

This Court has frequently held that it is for the jury, or the court below in the absence of a jury, to pass upon the credibility and the weight of the testimony of witnesses. *E. g.*, *Cherry-Burrell Co.* v. *Thatcher*, 107 F. 2d 65, 69 (C. C. A. 9th, 1939); *United States* v. *Alger*, 68 F. 2d 592 (C. C. A. 9th, 1934); *United States* v. *Dudley*, 64 F. 2d 743, 745 (C. C. A. 9th, 1933); *United States* v. *Albano*, 62 F. 2d 677, 681 (C. C. A. 9th, 1933); *United States Fidelity & Guaranty Co.* v. *Leong Dung Dye*, 52 F. 2d 567, 570 (C. C. A. 9th, 1931), cert. denied 285 U. S. 537 (1932).

to the public is itself a question of fact,[13] and the Commission's judgment as to their meaning and their false and deceptive character is conclusive unless palpably wrong. See *Brougham* v. *Blanton Manufacturing Co.*, 249 U. S. 495, 490–500 (1919); *Houston* v. *St. Louis Independent Packing Co.*, 249 U. S. 479, 484 (1919); *Farley* v. *Simmons*, 99 F. 2d 343, 346 (App. D. C., 1938), cert. denied 305 U. S. 651 (1938).[14]

[13] *Leach* v. *Carlile*, 258 U. S. 138, 139–140 (1922); *Brougham* v. *Blanton Manufacturing Co.*, 249 U. S. 495, 499–500 (1919); *Houston* v. *St. Louis Independent Packing Co.*, 249 U. S. 479, 484 (1919); *Farley* v. *Heininger*, 105 F. 2d 79, 81–82 (App. D. C., 1939), cert. denied 308 U. S. 587 (1939); *Farley* v. *Simmons*, 99 F. 2d 343, 346 (App. D. C., 1938), cert. denied 305 U. S. 651 (1938); *Chichester Chemical Co.* v. *United States*, 49 F. 2d 516, 518 (App. D. C., 1931); *Food and Drugs Act—Misbranding Sugar*, 34 Ops. Att'y Gen. 221, 227 (1924); *Duffy-Mott Co.* v. *United States*, 285 F. 737 (C. C. A. 3rd, 1923); *Eleven Gross Packages* v. *United States*, 233 F. 71, 73 (C. C. A. 3rd, 1916); *F. B. Washburn & Co.* v. *United States*, 224 F. 395, 399–400 (C. C. A. 1st, 1915); *United States* v. *American Laboratories*, 222 F. 104, 108–109 (E. D. Pa., 1915); *Putnam* v. *Morgan*, 172 F. 450 (S. D. N. Y., 1909); *Missouri Drug Co.* v. *Wyman*, 129 F. 623, 629 (C. C. E. D. Mo., 1904). See also *Sebrone Company* v. *Federal Trade Commission*, 135 F. 2d 676, 678–679 (C. C. A. 7th, 1943); *Aronberg* v. *Federal Trade Commission*, 132 F. 2d 165, 168 (C. C. A. 7th, 1942); *Federal Trade Commission* v. *Civil Service Training Bureau*, 79 F. 2d 113, 114–115 (C. C. A. 6th, 1935).

[14] *Bates & Guild Co.* v. *Payne*, 194 U. S. 106, 108–109 (1904); *Farley* v. *Heininger*, 105 F. 2d 79, 81–82 (App. D. C., 1939), cert. denied 308 U. S. 587 (1939); *Putnam* v. *Morgan*, 172 F. 450 (S. D. N. Y., 1909); *Missouri Drug Co.* v. *Wyman*, 129 F. 623, 629 (C. C. E. D. Mo., 1904). See also *Leach* v. *Carlile*, 258 U. S. 138, 139–140 (1922), and *cf. Rosen* v. *United States*, 161 U. S. 29, 42–43 (1896); *Chichester Chemical Co.* v. *United States*, 49 F. 2d 516, 518 (App. D. C., 1931); *United States* v. *Stobo*, 251 F. 689, 693–694 (D. Del., 1918); *Eleven Gross Packages* v. *United States*, 233 F. 71, 73–74 (C. C. A. 3rd, 1916); *United States* v. *American Laboratories*, 222 F. 104, 108–109 (E. D. Pa., 1915).

In determining the meaning of advertisements it is to be borne in mind that "The law is not made for the protection of experts, but for the public—that vast multitude which includes the ignorant, the unthinking and the credulous, who, in making purchases, do not stop to analyze, but are governed by appearances and general impressions." *Florence Manufacturing Co.* v. *J. C. Dowd & Co.,* 178 F. 73, 75 (C. C. A. 2nd, 1910). Deception may result from "implications reasonably derived * * * by the reader, as well as [from] express words," *Stunz* v. *United States,* 27 F. 2d 575, 579 (C. C. A. 8th, 1928),[15] for the "buying public does not ordinarily carefully study or weigh each word in an advertisement. The ultimate impression upon the mind of the reader arises from the sum total of not only what is said but also of all that is reasonably implied," and advertisements "are intended not 'to be carefully dissected with a dictionary at hand, but rather to produce an impression upon' prospective purchasers," *Aronberg* v. *Federal Trade Commission,* 132 F. 2d 165, 167 (C. C. A. 7th, 1942), having "no other object than to draw attention to the article to be sold." *Rast* v. *Van Deman & Lewis,* 240 U. S. 342, 365 (1916). They are therefore to be read as they would be read by the public to whom they are ad-

[15] "The skilful advertiser can mislead the consumer without misstating a single fact. The shrewd use of exaggeration, innuendo, ambiguity and half-truth is more efficacious from the advertiser's standpoint than factual assertions." Handler, The Control of False Advertising Under the Wheeler-Lea Act, 6 Law & Contemp. Prob. 91, 99 (1939).

dressed,[16] and the "fact that a false statement may be obviously false to those who are trained and experienced does not change its character, nor take away its power to deceive others less experienced. There is no duty resting upon a citizen to suspect the honesty of those with whom he transacts business. Laws are made to protect the trusting as well as the suspicious." *Federal Trade Commission* v. *Standard Education Society,* 302 U. S. 112, 116 (1937).

Advertisements which are ambiguous or capable of two meanings, one of which is false, are therefore misleading,[17] and advertisements which create a false impression, although literally true, are unlawful,[18] for

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[16] *Aronberg* v. *Federal Trade Commission*, 132 F. 2d 165, 167–168 (C. C. A. 7th. 1942); *D. D. D. Corporation* v. *Federal Trade Commission*, 125 F. 2d 679, 681–682 (C. C. A. 7th, 1942); *Ford Motor Co.* v. *Federal Trade Commission*, 120 F. 2d 175, 182 (C. C. A. 6th, 1941), cert. denied 314 U. S. 668 (1941); *Consolidated Book Publishers* v. *Federal Trade Commission*, 53 F. 2d 942, 944 (C. C. A. 7th, 1931), cert. denied 286 U. S. 553 (1932); *Newton Tea & Spice Co.* v. *United States*, 288 F. 475, 479 (C. C. A. 6th, 1923); *Royal Baking Powder Co.* v. *Emerson*, 270 F. 429, 435, 440–441 (C. C. A. 8th, 1920), appeal dismissed 260 U. S. 752 (1922); *Hall* v. *United States*, 267 F. 795, 797 (C. C. A. 5th, 1920); *Libby, McNeill & Libby* v. *United States*, 210 F. 148, 150–151 (C. C. A. 4th, 1913).

[17] *United States* v. *Ninety-Five Barrels*, 265 U. S. 438, 442–443 (1924); *Ford Motor Co.* v. *Federal Trade Commission*, 120 F. 2d 175, 182 (C. C. A. 6th, 1941), cert. denied 314 U. S. 668 (1941).

[18] *United States* v. *Ninety-Five Barrels*, 265 U. S. 438, 442–443 (1924); *General Motors Corp.* v. *Federal Trade Commission*, 114 F. 2d 33, 35–36 (C. C. A. 2nd, 1940), cert. denied 312 U. S. 682 (1941); *Farley* v. *Simmons*, 99 F. 2d 343, 345–346 (App. D. C., 1938), cert. denied 305 U. S. 651 (1938); *Taylor* v. *United States*, 80 F. 2d 604, 605–606 (C. C. A. 5th, 1936), cert. denied 297 U. S. 708 (1936); *Consolidated Book Publishers* v. *Federal Trade Com-*

"Words and sentences may be literally and technically true and yet be framed in such a setting as to mislead or deceive." *Bockenstette* v. *Federal Trade Commission,* 134 F. 2d 369, 371 (C. C. A. 10th, 1943); *Sebrone Company* v. *Federal Trade Commission,* 135 F. 2d 676, 679 (C. C. A. 7th, 1943).

The Federal Trade Commission Act does not require a showing of fraud or actual falsity; it condemns every advertisement of medical preparations "which is *misleading* in a material respect," and whether or not an advertisement is misleading is to be determined not merely by reference to representations actually made, but by reference to those "suggested" as well.[19] Representations which are misleading, although made innocently and in good faith, may be ordered discontinued,[20] and actual deception of pur-

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mission, 53 F. 2d 942, 944 (C. C. A. 7th, 1931), cert. denied 286 U. S. 553 (1932); *Royal Baking Powder Co.* v. *Emerson*, 270 F. 429, 440–441 (C. C. A. 8th, 1920), appeal dismissed 260 U. S. 752 (1922).

[19] The statute provides, "The term 'false advertisement' means an advertisement * * * which is misleading in a material respect; and in determining whether any advertisement is misleading, there shall be taken into account * * * representations made or suggested * * *." Federal Trade Commission Act, § 15 (a), 52 Stat. 116; 15 U. S. C. A. § 55 (a).

[20] *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U. S. 67, 81 (1934); *D. D. D. Corporation* v. *Federal Trade Commission*, 125 F. 2d 679, 682 (C. C. A. 7th, 1942); *Pep Boys* v. *Federal Trade Commission*, 122 F. 2d 158, 161 (C. C. A. 3rd, 1941); *Gimbel Brothers* v. *Federal Trade Commission*, 116 F. 2d 578, 579 (C. C. A. 2nd, 1941); *L. & C. Mayers Co.* v. *Federal Trade Commission*, 97 F. 2d 365, 367 (C. C. A. 2nd, 1938); *Fairyfoot Products Co.* v. *Federal Trade Commission*, 80 F. 2d 684, 687 (C. C. A. 7th, 1935).

chasers need not be shown in Federal Trade Commission proceedings;[21] business methods having a "capacity to deceive" are unlawful, *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U. S. 67, 81 (1934),[22] and "If the Commission, having discretion to deal with these matters, thinks it best to insist upon a form of advertising clear enough so that, in the words of the prophet Isaiah, 'wayfaring men, though fools, shall not err therein,' it is not for the courts to revise its judgment." *Aronberg* v. *Federal Trade Commission,* 132 F. 2d 165, 167 (C. C. A. 7th, 1943); *General Motors Corp.* v. *Federal Trade Commission,* 114 F. 2d 33, 36 (C. C. A. 2nd, 1940), cert. denied 312 U. S. 682 (1941).

A number of petitioners' advertisements were received in evidence.[23] Most of them include a picture

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[21] *Bockenstette* v. *Federal Trade Commission*, 134 F. 2d 369, 371 (C. C. A. 10th, 1943); *Pep Boys* v. *Federal Trade Commission*, 122 F. 2d 158, 161 (C. C. A. 3rd, 1941); *Federal Trade Commission* v. *Hires Turner Glass Co.*, 81 F. 2d 362, 364 (C. C. A. 3rd, 1935); *Brown Fence & Wire Co.* v. *Federal Trade Commission*, 64 F. 2d 934, 936 (C. C. A. 6th, 1933); *Masland Duraleather Co.* v. *Federal Trade Commission*, 34 F. 2d 733, 737–738 (C. C. A. 3rd, 1929); *Federal Trade Commission* v. *Balme*, 23 F. 2d 615, 621 (C. C. A. 2nd, 1928), cert. denied 277 U. S. 598 (1928); *Sears, Roebuck & Co.* v. *Federal Trade Commission*, 258 F. 307, 311 (C. C .A. 7th, 1919).

[22] *D. D. D. Corporation* v. *Federal Trade Commission*, 125 F. 2d 679, 682 (C. C. A. 7th, 1942); *Ford Motor Co.* v. *Federal Trade Commission*, 120 F. 2d 175, 181 (C. C. A. 6th, 1941), cert. denied, 314 U. S. 668 (1941); *Notaseme Hosiery Co.* v. *Straus*, 201 F. 99, 100 (C. C. A. 2nd, 1912).

[23] Commission Exhibits 8, 12, 13, 14, 15, 31, and 36 (physical exhibits) are typical. Excerpts from advertisements are printed at R. 43 and 52, and Commission Exhibits 44 and 51 (physical exhibits) are containers in which petitioners' preparation is sold.

similar to that appearing on Commission Exhibit 1 (R. 169), prominently featuring the letters "M. D.," a cross similar in design to the emblem of the American Red Cross,[24] and the likeness of the head of a trained nurse inset within the arms of the cross. They include such statements as:

> Medical science now answers the problems of millions of women with a truly effective, reliable antiseptic powder. [Comm. Ex. 12, R. 43.]
>
> A Valuable Prescription for Discriminating Women. * * * It is but recently that scientific research has developed new and improved methods to safeguard the health and happiness of married women. Endorsed by physicians and surgeons. [Comm. Ex. 8 A–B, R. 52.]
>
> Today medical science offers a truly effective germicide * * *. Harmless to delicate tissues, M. D. is a reliable medicated douche powder—a real tribute to the accomplishment of gynecological research. * * * Ask your druggist today for M. D.—the economical, scientifically approved, medicated douche powder * * *. [Comm. Ex. 36, physical exhibit.]
>
> M. D. Medicated Douche Powder, endorsed by leading physicians and surgeons, is a * * * reliable safeguard. [Comm. Ex. 12, R. 43.]

Typical advertisements and the container in which petitioners' preparation is sold were shown to a number of Commission witnesses, expert and lay, who were questioned concerning the meaning and impression to be gathered from them. Their testimony may be summarized as follows.

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[24] The cross is not colored.

Dr. Norman A. David, professor of pharmacology at the University of Oregon School of Medicine (R. 193), testified that the letters "M. D." stand for Doctor of Medicine, Medical Doctor, and "naturally * * * one would think" from the manner of their use by petitioners that petitioners' product "is endorsed by doctors," that it "is possibly recommended by a physician" (R. 203), and "is in some way connected with the Doctors of Medicine" (R. 216). He stated that he himself would not be deceived, of course, as he knew that no reputable physician would endorse the product (R. 203, 216, 220), but his "reaction" to petitioners' use of the letters "M. D." "was that it was * * * a method of advertising and appealing to the lay people who through ignorance may think it was endorsed by physicians. * * * the inference is that it has the backing of the medical profession," an inference heightened by petitioners' use of "the nurse and the cross" (R. 220–221).

Dr. Albert Holman, of Portland, Oregon, a physician specializing in obstetrics and gynecology (R. 235), testified that he believed a person seeing petitioners' container (Comm. Ex. 51), carrying the picture of the head of a trained nurse inset upon a cross between the letters "M D," would think "that it is recommended by the medical profession" (R. 240).

Dr. Thomas R. Montgomery, a practicing urologist (R. 259), testified that he thought petitioners' container "definitely would be considered misleading to the average person. * * * I think they would be led to suppose that that was endorsed by or produced

by an M. D. and sponsored by the * * * members of the Medical Society. I think that is deceiving" (R. 261). He said that the "insignia" M. D. "suggests that [petitioners' preparation] is a medical product," that he assumed "that is why those letters are there" (R. 265) and that the cross "applies to Red Cross" (R. 266).

Dr. Frank J. Clancy, a physician and surgeon of Seattle, Washington (R. 291), questioned by petitioners' counsel as to whether he thought petitioners' container (Comm. Ex. 51) indicated "any recommendation by the medical profession" (R. 300), testified:

> I think it implies that, all right, subtly, to a great many people who do not read things carefully * * *. I think that it implies * * * that doctors of medicine have put their stamp of approval on it, or have something to do with it, or it drags in the medical profession by implication at least * * *. [R. 300.]

Asked whether "the letters MD on toilet paper * * * give you the impression it is put out by doctors," Dr. Clancy replied:

> I think that is the impression [the manufacturers] are trying to give, that it is backed up by the medical profession or that the medical profession has something to do with it or endorses it or approves it. [R. 301.]

He testified further that petitioners, by using the letters "M. D.," are "implying that doctors have something to do with [the product]. You are dragging doctors in by the ears * * *. I think that it is deceptive" (R. 302).

Dr. Phillip Smith, a physician and surgeon of Seattle, Washington (R. 303), testified that "glancing at [petitioners' container] you would think the nurses approved [the product], and the Red Cross probably approved it, too, because [petitioners] copied that type of cross," and that the effect of the letters "M. D." is "to make the public jump to the conclusion the doctors are sponsoring" the preparation (R. 305).

Mr. Charles Marcellino, a shoe repairer of Mt. Rainier, Maryland (R. 53), testified that petitioners' advertisements led him to believe that their product is "endorsed by the doctors," by the "medical profession," for the "simple reason that it has the M. D. and a cross. You take a doctor's name—they all have an M. D. on it, and that would suggest that to me" (R. 54–55).

Mr. George H. Candey, engaged in the hardware business in Washington, D. C. (R. 59), was shown a specimen of petitioners' advertising matter and asked "what impression that conveys to your mind as to the products advertised" (R. 59). He replied:

> Well, the first impression and the most outstanding one to my mind would be, if not necessarily put out by doctors, that it was certainly endorsed by doctors. [R. 59.]

Mr. Candey was impressed by petitioners' use of "a picture of a nurse" and by "the cross," as well as the advertisements' specific reference to petitioners' products being "endorsed or approved by a doctor or physician" (R. 60), and he said that the letters "M. D." did not suggest anything to him "outside of

doctors," that "is the first thing that would come to my mind, because it is the most prominent usage of those two letters" (R. 64). He referred to petitioners' cross as "the Red Cross" (R. 64).

Mr. John W. Burroughs, a service station attendant of Washington, D. C. (R. 66), testified that "to look at [petitioners' advertisements] with the 'M. D.' and a cross and a picture of a nurse, I would say it was signed by doctors and medical association, and that [petitioners' product] was a good powder, approved by them" (R 66). He said that "a picture of a nurse and a cap, and then a cross and 'M. D.,' would just bring that to my mind. Without thinking of anything, it would automatically just bring that to my mind" (R. 69). Upon reading *all* of one of the advertisements about which he was questioned, Mr. Burroughs said that he would not think it was "signed" by a doctor, but he would still think the advertisement meant that petitioners' product had been approved by the medical profession because of the advertisement's use of the letters "M. D." and the picture of a cross and a nurse (R. 71–76), stating, "I would still say, if it had that 'M. D.' that a medical association had something to do with it * * * had approved it" (R. 72).

Mr. Francis J. O'Donnell, a druggist of Washington, D. C. (R. 76), was asked what impression as to petitioners' product their advertisements had upon his mind, and replied, "It looks like to me it was put out by a doctor or endorsed by a doctor or by a medical society" (R. 77, 78). He gathered this impres-

sion from petitioners' references to "Endorsed By Leading Physicians and Surgeons" (R. 79), and their use of pictures of doctors and nurses, a cross and the letters "M. D." (R. 77–79), stating, "or else the 'M. D.' wouldn't be on there" (R. 78) "what is the 'M. D.' on there for * * * other than to create that impression" (R. 79). Mr. O'Donnell said that "the looks of the package, the looks of the advertising," leads the "public to believe" that the medical profession had endorsed petitioners' preparation (R. 83), and that he knew from his experience with customers, from remarks they made every day (R. 87), that such advertising as petitioners' was misleading (R. 83), stating, "The women tell me when they come in to buy these things, 'It must be good; it is endorsed by doctors,' " (R. 85). Mr O'Donnell further testified that "at least 50 or 60 per cent, anyway" of douche powder sold in neighborhood drug stores is purchased by men (R. 81).[25]

Mr. Robert E. Taylor, a coca-cola salesman of Washington, D. C. (R. 87), testified that because of the use of the "cross and the 'M. D.' and the nurse" (R. 89), petitioners' advertising gave him the impression that it was approved and endorsed by the medical profession (R. 88–90, 92, 94).

Mr. Paul S. Currin, sales manager for a Washington, D. C., automobile concern (R. 95), testified that the impression conveyed to his mind by petitioners'

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[25] We invite attention to this fact in view of the statement in petitioners' brief that the "court may take judicial notice that women are * * * the sole purchasers" of their powder (p. 19).

use of "M. D." and the "cross, with the nurse on it" was that petitioners' product was approved "by the medical society or doctors and professional surgeons" (R. 95–96, 97), "just looking at [petitioners' advertisements] and seeing 'M. D.' * * * and the picture of the red cross and the nurse, naturally you would think it was approved by doctors" (R. 100, 101, 102).[26]

In this state of the record, it is difficult for us to understand how petitioners can pretend seriously to assert to a busy Court that there is no evidence to support the Commission's findings that their use of the letters "M. D.," and pictures of nurses, a doctor and a cross are not deceptive and misleading. It is certainly frivolous to contend that the testimony of the Commission's doctors was "inadmissible" (petitioners' brief, pp. 10, 12–16, 25–27), not only because it was plainly admissible as a matter of law, but because petitioners offered no objection to a single word of it (*supra* p. 9). The suggestion that the doctors were "unable to give an unbiased and uncolored opinion" (petitioners' brief, p. 12) and that their testimony was "founded on bias and prejudice" (*id.,* p. 15) is not only unwarranted by the record, but relates not at all to the admissibility of their testimony; it goes to their credibility, and it is for the Commission to determine the credibility of witnesses (*supra* p. 12).

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[26] Petitioners offered the testimony of several witnesses who testified that petitioners' advertisements and container did not deceive them. In view of the applicable law (*supra*, pp. 11–17), it is unnecessary to discuss this testimony.

As to the Commission's lay witnesses, petitioners do not contend that their testimony was inadmissible; petitioners insinuate, instead, that the Commission unduly influenced and coached them, stating that the Commission's investigator laid "the groundwork for [their] testimony" by asking them "if those letters [M. D.] suggested that the product was endorsed by doctors or the medical profession" (petitioners' brief, pp. 17–18, 22). Petitioners' statement is untrue,[27] and their insinuation is without foundation in fact. The Commission's investigator did, of course, interview the witnesses in question, but his interviews were for the necessary and entirely legitimate purpose of determining the public's reaction to petitioners' advertising, and nothing in the record, and no fair inference flowing from any fact established by the record, warrants the suggestion that the Commission's investigator attempted to influence or coach the witnesses in any way whatever. Even if that had been done—and it certainly was not—the circumstance would only relate to the credibility of the witnesses and the weight of their testimony, matters for the Commission to determine (*supra*, p. 12), and it cannot be said that their testimony was not substantial, for the best efforts of petitioners' counsel on cross-examination served not to shake it in the slightest degree; indeed, the testimony elicited by his argumentative questions emphasized the deceptive character of petitioners' advertising.

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[27] See R. 56, 62, 68, 91–92, 98–99.

There is no merit to petitioners' contention that its use of a cross is not deceptive or unlawful because "hundreds of other articles of merchandise are sold bearing * * * a cross similar to that used by the American Red Cross" (brief, p. 20) and the emblem is not "the sole property of that organization" (id., pp. 22–23). It is well settled that unlawful conduct on the part of others is no defense to a complaint charging a violation of the Federal Trade Commission Act,[28] and by the Act of Congress incorporating the American National Red Cross, that organization does have the exclusive right to the use of "any sign or insignia made or colored in imitation" of its emblem as against any person who did not use it prior to 1905.[29] Since petitioners' first use of a cross occurred

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[28] *Federal Trade Commission* v. *Keppel & Brother*, 291 U. S. 304, 312–313 (1934); *Federal Trade Commission* v. *Winsted Hosiery Co.*, 258 U. S. 483, 493–494 (1922); *Hills Bros.* v. *Federal Trade Commission*, 9 F. 2d 481, 485 (C. C. A. 9th, 1926), cert. denied 270 U. S. 662 (1926); *Ford Motor Co.* v. *Federal Trade Commission*, 120 F. 2d 175, 182 (C. C. A. 6th, 1941), cert. denied 314 U. S. 668 (1941); *National Candy Co.* v. *Federal Trade Commission*, 104 F. 2d 999, 1004 (C. C. A. 7th, 1939), cert. denied 308 U. S. 610 (1939); *Minter* v. *Federal Trade Commission*, 102 F. 2d 69, 70–71 (C. C. A. 3rd, 1939); *Farmers' Livestock Commission Co.* v. *United States*, 54 F. 2d 375, 379 (E. D. Ill., 1931); *Butterick Company* v. *Federal Trade Commission*, 4 F. 2d 910, 912 (C. C. A. 2nd, 1925), cert. denied 267 U. S. 602 (1925).

[29] The statute provides, in part, "It shall be unlawful for any person, corporation, or association other than the American National Red Cross * * * for the purpose of trade or as an advertisement to induce the sale of any article whatsoever or for any business or charitable purpose to use * * * the emblem of the Greek red cross on a white ground, or any sign or insignia made or colored in imitation thereof or of the words 'Red Cross'

long after that year, the Commission, under the declaration of policy set forth by Congress, could properly have barred its further use even had there been no evidence of deception.

Contrary to petitioners' contention, it is not at all "significant that the Commission offered not a single female witness to testify that she was * * * deceived" by petitioners' advertising (brief, p. 19), nor may this Court "take judicial notice that women are sole users * * * and * * * purchasers" of petitioners' product (*ibid.*) Petitioners' advertising, it is to be assumed, is intended to be and is read by both men and women, the record shows that men are frequent purchasers of preparations such as petitioners' (R. 81) and petitioners' product is specifically offered as a deodorant, gargle and mouth wash and for excessive perspiration, footbaths, cuts, sores and burns.[30] Petitioners' advertising was shown to be deceptive. It was entirely unnecessary to show that any purchasers had actually been deceived (*supra* pp. 16–17).

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* * *. No person, corporation, or association that actually used * * * the said emblem, sign, insignia, or words for any lawful purpose prior to January 5, 1905, shall be deemed forbidden to continue the use thereof for the same purpose and for the same class of goods. If any person violates the provision of this section he shall be deemed guilty of a misdemeanor and, upon conviction in any Federal court, shall be liable to a fine of not less than one or more than five hundred dollars, or imprisonment for a term not exceeding one year, or both, for each and every offense." 33 Stat. 600, as amended by 36 Stat. 604; 36 U. S. C. A. § 4. See *Loonen* v. *Deitsch*, 189 F. 487, 488–489, 492 (S. D. N. Y., 1911).

[30] See Commission Exhibit 8 (not printed) listing "6 Uses and Directions for M. D. Medicated Douche Powder."

At pages 21–22 of their brief, petitioners say that the Commission forbids them to "use the letters 'MD' on any preparation not endorsed or recommended by the medical profession," and since the Commission knows "that the medical profession does not directly endorse or recommend any product," the "order, therefore, is based upon a condition impossible of fulfillment." This is a curious contention. And rather than suggesting that the order possesses some unspecified infirmity, it points up its complete validity, for petitioners certainly have no right to advertise that their preparation is endorsed by the medical profession if it is not so endorsed, and it is somewhat startling to find it argued that the impossibility of obtaining such an endorsement privileges petitioners falsely to proclaim that it exists. We daresay this Court would be loath to declare that so long as an advertiser cannot possibly make good on what he says, he has a perfect right to say it.

Petitioners' contention that the letters "M. D." were adopted merely as "a trade name meaning 'Medicated Douche'" (brief, p. 22), rather than for the purpose of indicating medical approval of their preparation, would not be important if true, for an intent to deceive need not be shown in proceedings under the Federal Trade Commission Act; misrepresentations made innocently and in good faith may be ordered discontinued (*supra,* p. 16). But petitioners did not adopt the letters "M. D." as a "trade name" for their preparation, the name of which consists of both letters and words, "M. D. Medicated Douche Powder." The

letters "M. D." have long signified to the public a member of the medical profession, and by usage have become so identified with that profession as to connote "Medical Doctor" and nothing else. As the court said of the "degree of M. D." in *Townsend* v. *Gray,* 62 Vt. 373, 19 A. 635, 636 (1890), it has "legal sanction and authority. But it has more. In practical affairs, it introduces its possessor to the confidence and patronage of the general public." A desire to gain that confidence and patronage, we submit, was precisely what prompted petitioners to advertise as they did, and Mr. Henry M. White, a Commission attorney (R. 270), testified that when he interviewed petitioner Bachman while investigating this case, the latter stated that:

> the name M. D. * * * was suggested to him by an advertising man * * * and he wanted to convey the impression, without baldly stating the fact, that the product had been endorsed by the Medical Association.[31]

That petitioners' advertisements have a capacity to convey that impression to the public can hardly be doubted, and the Commission's finding to that effect is supported not only by the testimony to which we have referred, but by petitioners' advertisements themselves, silent witnesses which cannot be impeached. As the agency charged by Congress with the duty of protecting the public from misleading advertisements, the Commission, we suggest, because of its experience in dealing with the problem, may be assumed to be spe-

[31] R. 275. Mr. Bachman denied that he said this (R. 160–161).

cially qualified to interpret the language and meaning of advertisements as read by the public,[32] and we submit that its findings with respect to the deceptive character of petitioners' advertisements would have been warranted by the advertisements alone.[33] Supported both by them and by testimony as to actual public reaction, the findings cannot be successfully assailed.

IV

CONCLUSION

It is submitted that the Commission's findings as to the facts are supported by substantial evidence and

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[32] The Commission "was created with the avowed purpose of lodging the administrative functions committed to it in 'a body specially competent to deal with them by reason of information, experience and careful study of the business and economic conditions of the industry affected,' and it was organized in such a manner * * * as would 'give to [its members] an opportunity to acquire the expertness in dealing with these special questions concerning industry that comes from experience.'" *Federal Trade Commission* v. *Keppel & Brother*, 291 U. S. 304, 314 (1934). See also *Bates & Guild Co.* v. *Payne*, 194 U. S. 106, 108–109 (1904) ("where Congress has committed to the head of a department certain duties requiring the exercise of judgment and discretion, his action thereon, whether it involves questions of law or fact, will not be reviewed by the courts, unless he has exceeded his authority or this court should be of opinion that his action was clearly wrong"); *Schreiber* v. *United States*, 129 F. 2d 836, 839 (C. C. A. 7th, 1942); *Perkins* v. *Endicott Johnson Corp.*, 128 F. 2d 208, 220 (C. C. A. 2nd, 1942), aff'd *sub nom. Endicott Johnson Corp.* v. *Perkins*, 317 U. S. 501 (1943).

[33] See *Brougham* v. *Blanton Manufacturing Co.*, 249 U. S. 495, 499–500 (1919); *Houston* v. *St. Louis Independent Packing Co.*, 249 U. S. 479, 484 (1919); *Farley* v. *Simmons*, 99 F. 2d 343, 346 (App. D. C., 1938), cert. denied 305 U. S. 651 (1938), and cases cited *supra* note 14, p. 13.

that its order to cease and desist was properly entered. The Commission therefore prays that petitioners' petition to review be dismissed and that, pursuant to the statute,[34] the Court enter its decree affirming the Commission's order and commanding petitioners to obey the same and comply therewith.

Respectfully submitted.

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Washington, D. C., August 1943.

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[34] "To the extent that the order of the Commission is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission." Federal Trade Commission Act, § 5 (c), 52 Stat. 113; 15 U. S. C. A. § 45 (c).

APPENDIX

Pertinent provisions of the Federal Trade Commission Act (Act of September 26, 1914, 38 Stat. 717, 719-721, as amended by Act of March 21, 1938, 52 Stat. 111–114).

SEC. 5. (a) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.

The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce. * * *

(c) Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the circuit court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside. A copy of such petition shall be forthwith served upon the Commission, and thereupon the Commission forthwith shall certify and file in the court a transcript of the entire record in the proceeding, including all the evidence taken and the report and order of the Commission. Upon such filing of the

petition and transcript the court shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, evidence, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the Commission, and enforcing the same to the extent that such order is affirmed, and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors pendente lite. The findings of the Commission as to the facts, if supported by evidence, shall be conclusive. To the extent that the order of the Commission is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission. * * * [52 Stat. 111–113; 15 U. S. C. A. §45.]

SEC. 12. (a) It shall be unlawful for any person, partnership or corporation to disseminate, or cause to be disseminated, any false advertisement—

(1) By United States mails, or in commerce by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of food, drugs, devices, or cosmetics; or

(2) By any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase in commerce of food, drugs, devices, or cosmetics.

(b) The dissemination or the causing to be disseminated of any false advertisement within the provisions of subsection (a) of this section shall be an unfair or deceptive act or practice in commerce within the meaning of section 5. [52 Stat. 114–115; 15 U. S. C. A. § 52.]

SEC. 15. For the purpose of sections 12, 13, and 14—

(a) The term "false advertisement" means an advertisement, other than labeling, which is misleading in a material respect; and in determining whether any advertisement is misleading, there shall be taken into account (among other things) not only representations made or suggested by statement, word, design, device, sound, or any combination thereof, but also the extent to which the advertisement fails to reveal facts material in the light of such representations or material with respect to consequences which may result from the use of the commodity to which the advertisement relates under the conditions prescribed in said advertisement, or under such conditions as are customary or usual. * * *

(c) The term "drug" means * * * articles intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals; and * * * articles (other than food) intended to affect the structure or any function of the body of man or other animals * * *. [52 Stat. 116; 15 U. S. C. A. § 55.]

U. S. GOVERNMENT PRINTING OFFICE: 1943